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# EVIDENCE-PRIVILEGED COMMUNICATION-PRESENCE OF EAVESDROPPER NOT SUFFICIENT TOALTER CONFIDENTIAL RELATIONSHIP OF DOCTOR AND PATIENT

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# *DECISIONS*

EVIDENCE—PRIVILEGED COMMUNICATION—PRESENCE OF EAVESDROPPER NOT SUFFICIENT TO ALTER CONFIDENTIAL RELATIONSHIP OF DOCTOR AND PATIENT.—"No person duly authorized to practice physic or surgery shall be allowed to disclose any information which he may have acquired in attending any patient, in a professional character, and which information was necessary to enable him to prescribe for such a patient as a physician, or to do any act for him as a surgeon."[1] This statute was the first protection this state afforded those confidences that pass between a doctor and his patient as incident to the procedure of diagnosis and treatment. At Common Law, a physician, when called upon to testify as a witness, could not refuse to disclose any information so obtained on the ground that it had been communicated to him confidentially in the course of his attendance upon a patient. Neither could the patient refuse to disclose anything said to him by the physician.[2]

Under the derivative of that statute, section 352 of the New York Civil Practice Act, the court of appeals was called upon in a recent case[3] to decide whether that privilege is destroyed by reason of the presence of third persons who have overheard the conversations between the doctor and patient. Although the question was novel for this court, all justices concurred in the opinion that the testimony of the physician is privileged.[4]

In the instant case the defendant was driving alone in his car when, for a reason not apparent to witnesses, the automobile swerved out of control as it passed under a viaduct, increased its speed as it mounted the curb and struck a group of six schoolgirls from behind. Three of the children were found dead on arrival by the Medical Examiner, and a fourth child died in a hospital two days later as a result of injuries sustained in the accident. The car proceeded until it finally crashed through a brick wall of a grocery store, injuring at least one customer and causing considerable property damage. The injured customer, after receiving first aid, pressed the defendant for an explanation of the accident and he told her: "I blacked out from the bridge."

Defendant was then taken by the police to a hospital where after an interne had visited and treated him and given orders for therapy, a resident physician came to see him. A police guard, stationed to guard the defendant, remained, according to his own testimony, in the doorway of the room, 6 or 7 feet away. He stated that he heard the entire conversation between the defendant and the doctor, although he did not testify as to its content. The defendant was indicted and charged with violating section 1053-a of the New York Penal Law. The testimony of the doctor was the only testimony before the trial court showing that the defendant had epilepsy, suffered an attack at the time of the accident, and had knowledge that he was susceptible to such attacks.[5]

With regard to the general question of privilege, the burden is upon the claimant to show the existence of those circumstances which would justify its recognition.[6] The testimony of a physician was not privileged by the Revised Statutes[7] and is not privi-

[1] N. Y. Rev. St. (1829), part 3, ch. 7, tit. 3, Art. VIII, § 73.
[2] Annot., 47 A. L. R. 2d 742, § 1 (1956).
[3] People v. Decina, 2 N. Y. 2d 133, 138 N. E. 2d 799 (1956).
[4] *Id.* at 145, 138 N. E. 2d at 807.
[5] *Id.* at 139, 138 N. E. 2d at 803.
[6] Bloodgood v. Lynch, 293 N. Y. 308, 314, 56 N. E. 2d 718, 721 (1944) and cases cited therein.
[7] See note 1, *supra.*

leged by the present statute,[8] except when his information is acquired in attending a patient in a professional capacity, and where such information was required to enable him to act in that capacity.[9] This rule is well established in this state, and has been so broadly construed that though a physician is sent for the sole purpose of examining as to sanity, if he prescribes for the prisoner during the visit, the relation of physican and patient is thereby created and the disclosures made are within the statute.[10] It must have been assumed from the relationships existing that the information would not have been imparted except for the purpose of aiding the physician in prescribing for the patient.[11] Although Earl, J., in the case of *Edington* v. *Aetna Life Insurance Co.*,[12] propounded the view that the privilege should not prevent a doctor from testifying to those observations to which, at least, a lay person might testify, when the same question came before the court of appeals seven years later,[13] it was then distinctly held that the statute could not be confined to information of a confidential nature.

The reasons for which the New York State Legislature was induced to declare in favor of the basic privilege are clearly recognized by the court in an 1876 case.[14] "It is a just and useful enactment, introduced to give protection to those who were in charge of physicians from the secrets disclosed to enable them properly to prescribe for diseases of the patient. To open the door to the disclosure of secrets revealed on the sick bed, or when consulting a physician, would destroy confidence between the physician and the patient, and, it is easy to see, might tend very much to prevent the advantages and benefits which flow from this confidential relationship." This stricture, while broadly construed by the courts with application to the physician, have bound him to silence where the conversation was overheard by others present who were there in some medical capacity. A nurse who was not registered nor a professional properly gave testimony of conversations between the doctor, the patient and herself as to the cause of the patient's condition.[15] A medical student, present at the time an operation was being performed, could testify, while the doctor could not have described the operation or any condition which was necessarily disclosed by an inspection of the body.[16]

The question of the presence of third persons as affecting the privileged character of communications between patient and physician is one which, prior to the case at bar, has been treated only by the appellate division. The present case falls clearly within the scope of these decisions.[17] In *Denaro* v. *Prudential Insurance Co.*,[18] the court denied the right of the physician to testify. In answer to the contention that when communications are made to a physician in the presence of a third party, they lose the character of confidential communications, the court said that when a physician

[8] N. Y. Civ. Prac. Act § 352.

[9] Edington v. Aetna Life Ins. Co., 77 N. Y. 564, 3 N. E. 315 (1879).

[10] Meyer v. Knights of Pythias, 82 App. Div. 359, 81 N. Y. Supp. 813 (2d Dep't 1904), *aff'd*, 178 N. Y. 63, 70 N. E. 111, 64 L. R. A. 839 (1904), *aff'd*, 198 U. S. 508, 255 S. Ct. 754, 49 L. Ed. 1146 (1905).

[11] Edington v. Mutual Life Ins. Co., 67 N. Y. 185, 194 (1876).

[12] See note 9, *supra*.

[13] Renihan v. Dennin, 103 N. Y. 573, 9 N. E. 320 (1886).

[14] See note 9, *supra*.

[15] Hobbs v. Hullman, 183 App. Div. 743, 171 N. Y. Supp. 390 (3d Dep't 1918).

[16] Sparer v. Travelers Ins. Co., 185 App. Div. 861, 864, 173 N. Y. Supp. 673, 675 (1st Dep't 1919).

[17] See note 3, *supra*.

[18] 154 App. Div. 840, 843, 139 N. Y. Supp. 758, 761 (2d Dep't 1913).

enters a house for the purpose of attending a patient, he is called upon to make inquiries, not alone of the sick person, but of those who are about him, and who are familiar with the facts. Communications which are necessary for the performance of the duties of a physician are not public because made in the presence of the immediate family or those who are present because of the illness of the person. Of course the persons who are present are not denied the right to testify. As to the physician, the prohibition of the statute is absolute and he cannot reveal any information, whether acquired by someone telling him, by observation, or in any other manner.[19]

LEGAL ETHICS—UNAUTHORIZED PRACTICE BY MEXICAN ATTORNEY IN NEW YORK HELD A VIOLATION OF SECTION 270 OF THE PENAL LAW.—In a recent decision, the New York Court of Appeals has held that a Mexican citizen and lawyer of that country, but not a member of the New York Bar, who advised members of the New York public on Mexican law, including Mexican divorce law, violated section 270[1] of the New York Penal Law by practicing law in the State without a license to do so.[2]

The appellant, Lorenzo J. Roel, a Mexican citizen and a lawyer admitted to practice in that country, maintained offices in the City of New York for the purpose of advising members of the public on Mexican law. He also inserted in a local newspaper an advertisement to the effect that he was a Mexican lawyer in New York and in which he indicated the address where he maintained his office.

At his office in the city he prepared the legal papers and the documents which were required for the institution of divorce actions in Mexico, forwarded the same to a lawyer in Mexico whom he retained to represent the client, and took whatever other steps were necessary or required to aid and assist in the procurement of such divorce.

The appellant did not give any advice as to New York law and on his contract of retainer form used for divorce actions he requested his client to state that the appellant assumed no responsibility concerning the lack of validity or legal effect of the divorce decree outside of Mexico, and that the client had consulted a lawyer of his own state.

Appellant's defense was based on the following grounds: (1) That since he gave advice and prepared papers based on Mexican law, he did not practice "law" in New York because Mexican law is not law in New York; and (2) if he is subject to section 270 of the New York Penal Law, that statute is unconstitutional because it deprives him of liberty and property without due process of law.

The court answered the first contention by stating that the activities engaged in by the appellant did constitute the practice of law. The court pointed out that the preparing, as a business, of contracts and legal instruments by which legal rights are

[19] Annot., 96 A. L. R. 1419 (1935).

[1] N. Y. Pen. Law § 270: "It shall be unlawful for any natural person to practice . . . as an attorney-at-law . . . or to hold himself out to the public as being entitled to practice law as aforesaid, or in any other manner, . . . or advertise the title of lawyer . . . in such manner as to convey the impression that he conducts or maintains a law office . . . without having first been duly and regularly licensed and admitted to practice law in the courts of record of this state, and without having taken the constitutional oath. . . ."

[2] New York County Lawyers Association v. Roel, 3 N. Y. 2d 224, 144 N. E. 2d 24 (1957).

secured is a violation of section 270 unless the person doing so has first been licensed and admitted to practice in the courts of record of the state as an attorney-at-law.[3]

The basic purpose of the requirement of licensing of attorneys by the state is the protection of the members of the lay public when they seek legal advice. This protection must be deemed to embrace whatever kind of law or legal rights about which laymen may seek advice.[4] The court stated that were it to find that the appellant was not violating section 270 of the Penal Law, this would mean that a foreign law specialist could practice in New York without being subject to discipline because he could plead in defense that since the matter related to the law of a foreign state, he was not practicing law and was therefore immune from disciplinary action; he would not have to be a lawyer of the jurisdiction; he could even be without good character and his activities could not be regulated by the state.

In interpreting section 270, the Legislature's intention to restrict and safeguard the interests of the legal profession and to create greater public confidence in lawyers must also be considered.[5] The practice of law in New York under the guise of foreign law specialization, as was done by the appellant in this case, would be unfair to the present members of the New York Bar who are required to pass an examination before they are admitted to practice.

The court found no substance to the appellant's second claim: namely, that section 270 of the Penal Law as so construed was unconstitutional because it deprived him of his liberty and property without due process of law. Under the Fourteenth Amendment to the Constitution of the United States, "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

In a recent decision, the Supreme Court of the United States said: "A State can require high standards of qualifications, such as good moral character or proficiency in its law, before it admits an applicant to the bar," provided that the qualification has a rational connection with the applicant's fitness or capacity to practice law.[6]

Here the qualification that the appellant pass the Bar of New York State before he is admitted to practice has a rational and justifiable connection with the applicant's fitness to practice law. The prerequisites established for admission to the bar by the legislature are for the protection of the public.[7]

It must be noted, however, that section 270 does not prohibit such foreign lawyers as the appellant from giving advice here in New York regarding foreign law provided that they are employed to do so in conjunction with some lawyer who is admitted to practice in this state. This means that a foreign lawyer cannot give advice on foreign law directly to the public but may do so indirectly through a New York lawyer.

In a dissenting opinion, Justice Van Voorhis agreed that the information and advice which the appellant gave as to Mexican divorces did constitute the unlawful practice of law, in violation of section 270, due to the reason that the advice given or the

[3] People v. Alfani, 227 N. Y. 334, 125 N. E. 671 (1919); *In re* Bercu, 273 App. Div. 524, 78 N. Y. S. 2d 209 (1st Dep't 1948), *aff'd*, 299 N. Y. 728, 87 N. E. 2d 451 (1949).

[4] *In re* Standard Tax & Management Corp., 181 Misc. 632, 43 N. Y. S. 2d 479 (Sup. Ct. N. Y. Co. 1943).

Baldwin v. Lev, 163 Misc. 929, 297 N. Y. Supp. 963 (N. Y. Munic. Ct. 1937).

[6] Schware v. Board of Bar Examiners of New Mexico, 353 U. S. 232, 77 S. Ct. 752, 1 L. Ed. 2d 796 (1957).

[7] People v. Alfani, 227 N. Y. 334, 125 N. E. 671 (1919).

services rendered by him related to questions of status, property rights and other obligations in New York. However, he claimed that the injunction against the appellant was too broad, in that it restrained him from holding himself out as a Mexican attorney or from giving any advice to the public with respect to matters which pertain exclusively to foreign law. The dissenting judge contended that the prohibition of section 270 covers the practice of law in the courts of New York and advice given with respect to law binding in this state, but does not extend to advice given in reference to the laws of other countries or the preparation of papers for use in the courts of foreign countries where questions of status, property or other rights in New York are not affected. "When the legislature speaks, in general terms of the law, of things authorized by law, the expression must be understood as having exclusive reference to the laws of this state. . . . To hold that the word law or laws, as used in our statute book, includes any other laws than such as are in force in this state, would lead to endless confusion."[8]

The injunction as it now stands would prevent the giving of legal advice to the public in the State of New York by lawyers of other countries regarding business, financial or personal transactions anywhere in the world. Many New York law firms employ foreign lawyers who are not licensed to practice in New York. This arrangement is considered proper provided it is made clear in each jurisdiction that the foreign associate is unlicensed and not admitted to practice in that jurisdiction. However, under the doctrine of the majority opinion in this case, it would be quite as much practicing law to advise a New York State lawyer as it would be to advise a layman unless the New York lawyer assumed responsibility for the correctness of the advice, and did not merely act as a conduit to transmit the foreign lawyer's advice to the client.

When the Legislature enacted section 270 of the Penal Law, it knew of the prevailing customs and practices in this state and it did not expressly prohibit them. If the Legislature intended to prohibit a widespread practice and establish a new rule, it was its duty to say so clearly and unmistakably in the statute relating to the practice of law and rendition of legal services by individuals.[9]

The majority opinion represents the law today in New York State. However, the minority opinion represents a more realistic approach to the highly complex world in which we live. The economic growth of the United States during this century has made it the creditor nation of the world. Our commercial, financial and industrial activities have extended to all parts of the world, making it necessary that the citizens of this state be able to get legal advice by trained lawyers from abroad, who are equipped to give accurate information and opinions regarding these foreign enterprises. The solution of this problem is solely within the province of the legislature. It should pass legislation licensing foreign attorneys to deal with clients in matters exclusively concerning foreign law.

TORTS—LIBEL—USE OF WORDS "POLICE SAID" HELD INSUFFICIENT TO BRING PUBLICATION WITHIN QUALIFIED PRIVILEGE OFFERED BY SECTION 337 OF THE NEW YORK CIVIL PRACTICE ACT.—In a publication by the defendant, the police were quoted as saying that the plaintiff had certain weapons in his possession and that he had threatened to kill his wife. In the ensuing action for libel, the defendant asserted, as an affirmative defense,

[8] People v. Sturdevant, 23 Wend 418 (Sup. Ct. N. Y. Co. 1840).
[9] People v. Title Guarantee & Trust Co., 227 N. Y. 366, 125 N. E. 666 (1919).

that the publication complained of was privileged as a fair and true report of a judicial or other public or official proceeding.

The appellate division stated that the only reference to judicial or public or official proceedings that could be found in the pleadings were the words "police said." They held them to be insufficient to indicate whether this was the report of a proceeding; that if it were a narration in private to newspaper reporters by police officers, it was not a public or official proceeding coming within the purview of section 337 of the New York Civil Practice Act. "It would be difficult to apply the term proceeding (they stated), as used in the former or present statutes, to merely informal statements or assertions by public officers concerning their investigations."[1]

The New York State Legislature in 1854 enacted a law[2] providing that "no reporter, editor or proprietor of any newspaper shall be liable to any action, civil or criminal, for a fair and true report of any judicial, legislative, or other public official proceeding except on proof of actual malice." This statute, it has been said, was "simply declarative of the common law".[3] Upon codification of the laws into the Code of Civil Procedure this qualified privilege was therein included as section 1907. Upon the recodification into the Civil Practice Act it was carried over as section 337.[4]

It would appear that the courts, in construing section 337 and its predecessor statutes, have in certain cases extended its scope, and yet in other cases have restricted its benefits. Thus, with respect to judicial proceedings, the privilege is supported by "the public interest in having proceedings of courts of justice, public not secret, for the greater security thus given for the proper administration of justice. For the self-same reason it was early provided, by statute, that the sittings of every court within this state shall be public and (individual) citizens may freely attend the same. The public, generally, may not attend the sitting of the court but they may be kept informed by the press of what goes on in the courts."[5]

On this ground, reports of a proceeding before a magistrate were held to be within the privilege, as were daily reports of a trial prior to a final decision having been rendered.[6] Consistency of ruling required, and it was so held, that publication of a filed pleading, which is deemed to be a public and official act within the course of an official proceeding, is also privileged.[7] However, no privilege attached to the publication of an article based upon an answer before it was either served or filed. The fact that it became a public document subsequent to publication did not change the result.[8] It is, therefore, clearly indicated that extending the scope of this statute must be kept within the proper bounds.[9]

Rule 278 of the Rules of Civil Practice, which bars public inspection of papers

[1] Kelly v. Hearst Corp., 2 A. D. 2d 480, 157 N. Y. S. 2d 498 (1956), *leave to appeal denied*, 3 A. D. 2d 963, — N. Y. S. 2d —, (3d Dep't 1957).

[2] N. Y. Sess. Laws 1854, c. 130.

[3] Ackerman v. Jones, 34 N. Y. Super. Ct. 42, 5 J & S 42 (N. Y. 1874).

[4] N. Y. Civ. Prac. Act § 337 was amended by: N. Y. Sess. Laws 1930, c. 619 (removed express statutory privilege); N. Y. Sess. Laws 1940, c. 561 (privilege was extended to include publication by all persons); N. Y. Sess. Laws 1956, c. 891 (the word "public" was removed).

[5] Lee v. Brooklyn Union Pub. Co., 209 N. Y. 245, 102 N. E. 155 (1913). *But see*, United Press Assoc. v. Valente, 308 N. Y. 71, 123 N. E. 2d 777 (1954).

[6] See *supra*, note 5, Lee v. Brooklyn Union Pub. Co.

[7] Cambell v. N. Y. Evening Post, 250 N. Y. 320, 157 N. E. 153 (1927), *reversing*, 219 App. Div. 169, 218 N. Y. Supp. 446 (1st Dep't 1926).

[8] May v. Syracuse Newspapers, 250 App. Div. 155, 294 N. Y. Supp. 867 (3d Dep't 1937).

[9] See note 7, *supra*.

filed in a matrimonial action, raised the question as to whether the defense of privilege was valid where the contents of such restricted papers were published.[10] The court of appeals answered this question when it held that, in a libel action,[11] where defendant had violated rule 278, the defense of qualified privilege was properly stricken out of the answer. "Judicial proceedings are viewed as a public event in the sense that those who see and hear what transpired can report it with impunity. But freedom of the press is in no way abridged by an exclusionary ruling which denies to the public, generally, including newspapermen, the opportunity to see and hear what transpired. In line with that thinking we recently upheld the validity of a court rule,[12] restricting access by persons who are not parties to the filed pleadings or testimony in matrimonial actions. In so doing—we observed that there are a number of areas in which the preservation of secrecy has similarly been directed by the legislature in respect of court records."[13]

With respect to that portion of the statute which refers to legislative and other public and official proceedings, it was early held that an article about the actions of a member of the state legislature, upon certain proposed legislation, came within the statutory qualified privilege.[14] A limitation of the privilege was evidenced, however, when it was subsequently held[15] that an investigation by persons connected with the coroner's office, and by members of the municipal police force, does not constitute such judicial or other public or official proceeding as to fall within the scope or meaning of the statute.

The rationale for the application of this statute, when applied to public and official proceedings, appears in the dicta of *Briarcliff* v. *C-S Publishers,*[16] wherein the court of appeals said: "The payment of taxes is a matter vital to us all. We are all expected to pay on the due date; it is a matter of public concern and surely of public interest to know whether a large amount of taxes, especially in small communities, remains unpaid. To furnish news upon these matters is the justification of the existence of newspapers. Village officers have a duty to perform, which must be impartially administered. The fact that the newspapers are ever ready to report any irregularity or acts of favoritism has a tendency to keep officials up to the high marks of their callings. A Water Board, having the power to collect bills or turn off the water supply is a public official whose proceedings and actions may be given as news and comes under the privilege of Section 337. The actions of such public officials and the delay in the collection of taxes are matters about which a paper may make comments as long as they are just and fair."

On the basis of this reasoning, the privilege was extended to an article based on a press release of a secret investigation conducted by the Acting Administrator of the Civil Works Administration.[17] Employees of an agency of the government were being

[10] Stevenson v. News Syndicate Co., 276 App. Div. 614, 96 N. Y. S. 2d 751 (2d Dep't 1950), *aff'd,* 302 N. Y. 81, 96. N. E. 2d 187 (1951); Stolow v. Hearst Corp., — Misc. —, 105 N. Y. S. 2d 284 (Sup. Ct. N. Y. Co. 1951).

[11] Danziger v. Hearst Corp., 304 N. Y. 244, 107 N. E. 2d 62 (1952).

[12] The court is referring to Danziger v. Hearst Corp., see note 11 *supra.*

[13] See *supra,* note 5, United Press Assoc. v. Valente; also, in this connection see N. Y. Sess. Laws 1956, c. 891 and the comment of the Governor on signing the bill.

[14] Garby v. Bennett, 166 N. Y. 392, 59 N. E. 1117 (1901).

[15] Nunally v. Press Pub. Co., 110 App. Div. 10, 96 N. Y. Supp. 1042 (2d Dep't 1905); see note 1, *supra.*

[16] 260 N. Y. 106, 183 N. E. 193 (1927).

[17] Farrell v. N. Y. Evening Post, 167 Misc. 412, 3 N. Y. S. 2d 1018 (Sup. Ct. N. Y. Co. 1938).

dismissed after an investigation and reasons for their dismissals were matters of which the public should have been informed. Similarly, when the defendant published a book, in which reference was made to a proceeding pending before the Federal Trade Commission (in which proceeding plaintiff was charged with misrepresentation), the publication was held qualifiedly privileged, since it was a report of a case before a public administrative board on a matter of general concern and public interest.[18] In the same tenor, an investigation by the office of a District Attorney was held to be a public and official proceeding within the statutory privilege of section 337.[19]

"Proceeding," therefore, as used in section 337 of the Civil Practice Act, implies that the source of the information is more important than the information itself in determining whether or not a publication is privileged. Although it has never been so expressly stated, it would seem that a fair and true report of a determination or finding which is the result of considered opinion and which emanates from an authoritative source would be within the qualified privilege extended by the statute.[20]

[18] Mack, Miller Candle Co. v. MacMillan Co., 239 App. Div. 738, 269 N. Y. Supp. 33 (4th Dep't 1934).

[19] Bauman v. Newspaper Enterprises, 270 App. Div. 825, 60 N. Y. S. 2d 185 (2d Dep't 1946).

[20] Whether or not the publication is a fair and true report is another consideration. See note 16, *supra,* Briarcliff Hotel v. C-S Publishers.